SUN PROPERTIES SDN. BHD. & ORS.

v.

HAPPY SHOPPING PLAZA SDN. BHD.

SUPREME COURT, KUALA LUMPUR
WAN SULEIMAN SCJ
HASHIM YEOP SANI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 141 OF 1986]
8 JUNE 1987

CONTRACT: *Sale/purchase agreement - Purchaser paid RM1,000,000 'as deposit and towards account of purchase price' - Balance to be paid by two instalments - If purchaser fails to pay any of the instalments - Effect - Vendor 'shall be entitled to forfeit all sum paid' - Purchaser failed to pay first instalment - Vendor repudiated agreement and forfeited RM1,000,000 paid 'as deposit and towards account of purchase price' - Whether RM1,000,000 was true deposit.*

By a sale/purchase agreement dated 11 May 1981, the respondent agreed to purchase from the appellants all the shares in one Loke Kee Development Sdn. Bhd. at a total purchase price of RM10,000,000. The respondent paid to the appellants the sum of RM1,000,000 as deposit and towards account of the purchase price. By clause 2 of the agreement it was agreed that the balance of RM9,000,000 shall be paid to the appellants' solicitors, in the manner being:

(i) The sum of RM4,000,000 on or before 3 October 1981
(ii) The sum of RM5,000,000 on or before 3 December 1981

By clause 4 thereof it was also agreed that if the respondent failed to pay any of the instalments within the stipulated time the appellants shall be entitled to forfeit all sums thencetofore paid by the purchaser/respondent ... By clause 15 thereof it was further agreed that time whenever mentioned in the agreement shall be the essence of the contract.

The respondent failed to pay the 1st instalment for RM4,000,000 on the due date. The appellants thereupon repudiated the agreement and forfeited the said RM1,000,000 paid as deposit and towards account of the purchase price.

By originating summons the respondent sought from the High Court a declaration that clause 4 of the sale agreement was invalid and unenforceable being in breach and violation of s. 75 of the Contracts Act 1950 and also for a consequent declaration that the forfeiture of the said RM1,000,000 is illegal, null and void. The learned Judge granted the declarations.

The crux of the matter in this case was whether the RM1,000,000 was a true deposit.

Held:

[1] The expression "as a deposit and part payment of the purchase money" always relates to the two alternatives that in the event of the purchaser making default the money is to be forfeited and that in the event of the purchase being completed the sum is to be taken as part payment. A deposit is not merely a part payment but is also an "earnest" to bind the bargain entered into and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract.

[2] On a proper reading of clause 1 and 4 of the sale agreement the RM1,000,000 forfeited in this case is a true deposit and was lawfully and properly forfeited by the appellants.

[Appeal allowed with costs.]

Cases referred to:
Linggi Plantations Ltd. v. Jagatheesan [1972] 1 MLJ 89
Howe v. Smith [1884] 27 Ch D 89
Soper v. Arnold [1889] 14 App Cas 429
Fateh Chand v. Balkishan Dass [1963] AIR SC 1405

Legislation referred to:
Contracts Act 1950, s. 75
Contract Act [Ind], s. 74

For the appellants - Cecil Abraham (Y.M. Siew with him); M/s. Soo Thien Ming & Shahrizat.
For the respondent - C.V. Das (K.S. Cheong with him); M/s. Shook Lin & Bok.

JUDGMENT

Hashim Yeop Sani SCJ:

On 11 May 1981 the respondent entered into a sale agreement with the appellants to purchase from the appellants all the shares held in one Loke Kee Development Sdn. Bhd. for consideration of RM1,000,000. Because the interpretation of certain clauses in the sale agreement will be crucial in arriving at a decision in the appeal the relevant clauses are reproduced below:

> 1. In consideration of the sum of Malaysian Ringgit One Million (RM1,000,000) only now or heretofore paid to the Vendors by the Purchaser **as deposit and towards account of the purchase price** (the receipt whereof the vendors hereby expressly acknowledge) the Vendors hereby sell and the Purchaser hereby purchase the said shares free from encumbrances at the total purchase price of Malaysian Ringgit Ten Million (RM10,000,000) only.
>
> 2. The balance of the purchase price amounting to Malaysian Ringgit Nine Million (RM9,000,000) only shall be paid by the purchaser to the vendors solicitors Messrs Soo Thien Ming & Shahrizat, advocates and solicitors of Wisma Tek Lee, 2nd Floor, Jalan Tun Razak, Kuala Lumpur (hereinafter called "the Vendors' Solicitors") in the manner hereunder set out:
>
> (i) On or before 3 October 1981 . . RM4,000,000
> (ii) On or before 3 December 1991 . . RM5,000,000
>
> 4. It is hereby expressly agreed between the parties hereto that if the purchaser fails to pay any of the instalments within the stipulated time as mentioned under clause 2 hereof, **the vendors shall be entitled to forfeit all sums thencetofore paid by the purchaser** to the vendors and whereupon this Agreement shall terminate and [be] of no further effect and neither party shall have any claim against the other.
>
> 15. Time whenever mentioned in this Agreement shall be the essence of the contract.
>
> (emphasis provided)

The respondent failed to pay the first instalment for RM4,000,000 in accordance with clause 2(i) on the due date and the appellants thereupon repudiated the agreement and forfeited the said RM1,000,000 paid as deposit and towards account of the purchase price under clause 1.

The respondent by originating summons sought from the High Court a declaration that clause 4 of the sale agreement is invalid and unenforceable being in breach and violation of s. 75 of the Contracts Act 1950 and also sought for a consequent declaration that the forfeiture of the said RM1,000,000 is illegal, null and void. The learned Judge granted the declarations.

Section 75 of the Contracts Act reads:

> 75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

The learned Judge was of the view that clause 4 of the sale agreement provided for the forfeiture of not only one definite sum but actually two different sums depending on when the respondent failed to perform. He was also of the view that the RM1,000,000 as stipulated in clause 1 does not represent a "deposit simpliciter' but forms part and parcel of a larger sum of RM5,000,000. He concluded that this is a kind of situation where s. 75 of the Contracts Act should be applied and directed that a reasonable compensation be assessed at a later date.

The crux of the matter here is whether the RM1,000,000 is a true deposit. If it is a true deposit or earnest money (the two terms being interchangeable) then the sum is irrecoverable by the respondent and it can lawfully be forfeited by the appellants. The fact that the amount is RM1,000,000 does not alter the position since 10% of the purchase price is normally a standard amount put as deposit and as lord Hailsham LC said in *Linggi Plantations Ltd. v. Jagatheesan* [1972] 1 MLJ 89:

> There is nothing unusual or extortionate in a 10% deposit on a contract for the sale of land.

The expression used in clause 1 of the sale agreement in the instant case is a standard expression used in all sale agreements where money is paid as a deposit and part payment of the purchase price. The expression "as a deposit and part payment of the purchase money" always relates to the two alternatives that in the event of the purchaser making default the money is to be forfeited and that in the event of the purchase being completed the sum is to be taken as part payment. A deposit is not merely a part payment but is also an "earnest" to bind the bargain entered into and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract - see *Howe v. Smith* [1884] 27 Ch D 89. The deposit therefore serves two purposes, that is, if the purchase is carried out it goes against the purchase money but the primary purpose for the deposit is to act as a guarantee that the purchaser means business - per Lord MacNaghten in *Soper v. Arnold* [1889] 14 App Cas 429.

On a plain reading of clause 1 of the sale agreement in this case there is no doubt that the RM1,000,000 is a true deposit and the appellants are entitled to forfeit the sum when the respondent failed to comply with clause 2 of the agreement. The description "all sums thencetofore paid by the purchaser to the vendors" must certainly include the RM1,000,000 paid in clause 1.

In his judgment the learned Judge accepted that the RM1,000,000 is 10% of the purchase price and is an acceptable amount as deposit. But he concluded that in this case it is not a deposit simpliciter but forms part of a much larger sum namely RM5,000,000. On a proper

reading of clause 1 and 2 of the agreement we are unable to support this conclusion. What apparently worried the learned Judge was that part of clause 4 of the agreement which purports to entitle the appellants to forfeit all sums thencetofore paid by the purchaser if the purchaser failed to pay the final instalment under clause 2(ii) of the agreement which would make it according to him a stipulation by way of penalty within the meaning of s. 75 of the Contracts Act.

It is to be observed firstly that this is not the situation here. The default by the respondent in the present case is in the very first instalment under clause 2(i) of the agreement and the sum thencetofore paid was RM1,000,000 which is 10% of the purchase price and nothing more. Secondly as can be observed in *Linggi Plantations* Lord Hailsham when referring to *Fateh Chand v. Balkishan Dass* [1963] AIR SC 1405 drew the distinction between the sum of Rs. 1,000 expressly named and paid as earnest money and a further sum of Rs. 24,000 which the Court held was not in the nature of earnest money and therefore subject to the provision of s. 74 of the Indian Contract Act. Finally, as observed by the Court in *Fateh Chand* s. 74 of the Indian Contract Act (in *pari materia* with s. 75 of our Contracts Act) deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains a stipulation by way of penalty. Shah J added however that:

> We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class.

In that case the contract provided for forfeiture of Rs. 25,000 consisting of Rs. 1,000 paid as earnest money and Rs. 24,000 paid as part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs. 1,000 which was paid as earnest money.

We are of the view that on a proper reading of clause 1 and 4 of the sale agreement the RM1,000,000 forfeited in this case is a true deposit and was lawfully and properly forfeited by the appellants. The appeal is accordingly allowed with costs here and below.

Also found at [1987] 2 CLJ 423